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Losing Relevance: Quebec and the Constitutional Politics of Language

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Emmanuelle Richez

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Abstract:

This article is interested in evaluating whether Quebec has lost relevance in the constitutional politics of language. It proposes a doctrinal analysis of the Supreme Court's Charter jurisprudence, with an emphasis on the most recent body of case law, and an assessment of its political consequences in the area of language policy in Quebec. The article will argue that constitutional review has increasingly protected individual rights over Quebec's collective right to maintain its language and culture. This can be explained by the move towards an implacable parallel constitutionalism and a redefinition of official minority linguistic rights in the jurisprudence, as well as by the exhaustion of Quebec's legislative counterattacks to court rulings. The article will conclude that Quebec is no longer driving concepts of Canadian citizenship. Undifferentiated, rather than multinational, citizenship appears to be the direction in which Charter language jurisprudence is taking Canada.

Keywords:

Language Rights, Collective Rights, Citizenship, Canadian Charter of Rights and Freedoms, Charter of the French Language (Quebec), Canada-Quebec Relations

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Losing Relevance: Quebec and the Constitutional Politics of Language

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Introduction	1
I. Language Rights in Quebec and Canadian Citizenship	3
II. Early Language Rights jurisprudence: The Path towards Linguistic Peace	13
A. <i>A.G. (Que.) v. Quebec Protestant School Boards</i> (1984)	14
B. <i>Ford v. Quebec</i> (1988) and <i>Devine v. Quebec</i> (1988)	16
III. Recent Language Rights Jurisprudence: The Legal Armistice Challenged	22
A. <i>Gosselin v. Quebec</i> (2005)	23
B. <i>Solski v. Quebec</i> (2005)	25
C. <i>Nguyen v. Quebec</i> (2009)	28
IV. Analysis	32
A. <i>The Move Towards an Implacable Parallel Constitutionalism</i>	32
B. <i>A Redefinition of Official Minority Linguistic Rights</i>	37
C. <i>The Exhaustion of Legislative Counterattacks</i>	42
Conclusion	47

Introduction

When the *Canadian Charter of Rights and Freedoms, 1982* (hereinafter “*Charter*”)¹ was first adopted, its potential impact on the balance between individual and collective rights in Canada was much debated. Although some authors contended that the *Charter* was mostly a vehicle for liberal individualism,² others thought that it retained elements of communitarianism.³ Quebec had precisely

*The author would like to thank Christopher Manfredi, Francesca Taddeo and Benoît Pelletier, as well as anonymous reviewers for their comments on previous drafts of this article.

¹Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

²See e.g. Allan C Cairns, “Constitutional Change and the Three Equalities” in Ronald L. Watts & Douglas M. Brown, eds, *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 77; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994).

refused to ratify it, since it not only failed to recognize the province's "distinct" or "national" character, but it also severely reduced Quebec's power to legislate in the area of language policy, which would help the province preserve its Francophone culture.⁴ Whether Quebec has been the biggest "loser" under the *Charter* is a matter of debate. On the one hand, only a decade after the application of the *Charter*, many authors pointed out that the judiciary had nullified more laws in Quebec than in any other province and that those laws touched on language, a crucial policy area for the maintenance of Quebec's unique Francophone identity in North America.⁵ Others contended that the impact of the *Charter* on Quebec had been overstated, notably because Quebec retained the power to limit the access of immigrants to English schools under the new constitutional linguistic regime by channelling them into the French education system.⁶ However, this power has recently been questioned in *Gosselin (Tutor of) v. Quebec (Attorney General)*⁷ and limited in *Solski (Tutor of) v. Quebec (Attorney General)*⁸ and *Nguyen v. Quebec (Education, Recreation and Sports)*⁹ by the Supreme Court of Canada.

³See e.g. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Agincourt: Carswell, 1987) [Monahan, "Politics"]; David J Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness" (1989) 22:4 Can J Pol Sc 699.

⁴See e.g. Mandel, *supra* note 2; Guy Laforest, *Pour la liberté d'une société distincte: Parcours d'un intellectuel engagé* (Sainte-Foy: Presses de l'Université Laval, 2004).

⁵See Guy Laforest, *Trudeau and the End of a Canadian Dream* translated by Paul Leduc Browne & Michelle Weinroth (Montreal: McGill-Queen's University Press, 1995); Yves De Montigny, "The Impact (Real or Apprehended) of the Canadian Charter of Rights and Freedoms on the Legislative Authority of Quebec" in David Schneiderman & Kate Sutherland, eds, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: Published in association with the Centre for Constitutional Studies, University of Alberta, by University of Toronto Press, 1997) 3; F L Morton, "Judicial Politics Canadian Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992" in Curtis Cook, ed, *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal: McGill-Queen's University Press, 1994) 132.

⁶See especially James B Kelly, "Reconciling Rights and Federalism During Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999" (2001) 34:2Can J Pol Sc321; Peter H Russell, "The Political Purposes of the Charter: Have They Been Fulfilled? An Agnostic Report Card" in Philip Bryden, Steven Davis & John Russel, eds, *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (Toronto: University of Toronto Press, 1994) 33.

⁷2005 SCC 15, [2005] 1 SCR 238 [*Gosselin* cited to SCC].

⁸2005 SCC 14, [2005] 1 SCR 201 [*Solski* cited to SCC].

⁹2009 SCC 47, [2009] 3 SCR 208 [*Nguyen* cited to SCC].

The aforementioned trilogy of cases shows that the debate on the nature of the rights embodied in the *Charter* remains salient. Therefore, this article is interested in evaluating whether Quebec has lost relevance in the constitutional politics of language. More specifically, it proposes a doctrinal analysis of the Supreme Court's *Charter* jurisprudence, with an emphasis on the most recent body of case law, and an assessment of its political consequences in the area of language policy in Quebec. The article will argue that constitutional review has increasingly protected individual rights over Quebec's collective right to maintain its language and culture. This can be explained by the move towards an implacable parallel constitutionalism and a redefinition of official minority linguistic rights in the jurisprudence, as well as by the exhaustion of Quebec's legislative counterattacks to court rulings. The article will conclude that Quebec is no longer driving concepts of Canadian citizenship. Undifferentiated, rather than multinational, citizenship appears to be the direction in which *Charter* language jurisprudence is taking Canada. But before taking on this task, this paper will show how the content and scope of language rights have evolved in Quebec since Confederation as well as how they have influenced conceptions of Canadian citizenship.

I. Language Rights in Quebec and Canadian Citizenship

Citizenship is a multifaceted concept that gives way to many definitional and theoretical challenges.¹⁰ A recurring theme in the literature is the primordial link between citizenship and access to rights in liberal democracies. In his famous *Citizenship and Social Class*, T.H. Marshall argued that citizenship

¹⁰See Linda Bosniak, "Citizenship Denationalized" (2000) 7:2 *Ind J of Global Legal Stud* 447; Will Kymlicka & Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1994) 104:2 *Ethics* 352; Pater Schuck, "Citizenship in Federal Systems" (2000) 48:2 *Am J Comp L* 195; Jane Jenson, "Introduction: Thinking About Citizenship and Law in an Era of Change" in Law Commission of Canada, ed, *Law and Citizenship* (Vancouver: UBC Press, 2006) 3.

consisted of political, civil and social rights brought about by the modern capitalist order.¹¹ This rights-based vision of citizenship has since been enlarged to include cultural rights, such as linguistic rights.¹² The nature of the cultural rights granted in any polity informs its type of citizenship. On one end of the spectrum lies the “universal” or “undifferentiated” conception of citizenship which recognizes the right-bearing equality of individuals and is blind to cultural group differences, and on the other, the “pluralist” or “differentiated” conception of citizenship which posits that substantive equality requires a differential treatment of certain cultural groups.¹³

Differentiated citizenship can take many forms depending on the level of diversity that it promotes and how it translates into rights and policies. Will Kymlicka distinguishes “polyethnic” citizenship from “multinational” citizenship.¹⁴ “Polyethnic” citizenship is associated with group differentiated rights for immigrants which promote cultural retention, for example ethno-cultural activities funding and exemption rights, but insists on the necessity to facilitate their integration into mainstream society by providing official-language training. By often recognizing equally all cultural differences, “polyethnic” citizenship is close to the “undifferentiated” model on the citizenship spectrum. In contrast, “multinational” citizenship involves self-government rights given to national minorities, such as French-Quebeckers, to help them counter cultural assimilation from the dominant society and maintain a distinct collective identity.¹⁵

¹¹TH Marshall, *Citizenship and Social Class: And Other Essays* (Cambridge: Cambridge University Press, 1950).

¹²See especially Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995).

¹³Iris Marion Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship” (1989) 99:2 *Ethics* 250.

¹⁴Kymlicka, *supra* note 12.

¹⁵*Ibid.* It should be noted that Kymlicka’s protection of collective identities finds its justification in individual autonomy. For a different view, see Dwight Newman, “Putting Kymlicka in Perspective: Canadian Diversity and Collective Rights” in Stephen Tierney, ed. *Accommodating Cultural Diversity* (New Hampshire: Ashgate Publishing Company, 2007) 59.

Alan Patten and Will Kymlicka argue that the recognition of language rights are inextricably linked to the establishment of multinationalism.¹⁶ They categorize language rights and policies according to four distinctions: “(1) tolerance vs promotion-oriented rights; (2) norm-and-accommodation vs official-languages rights regimes; (3) personality vs territoriality rights regimes; and (4) individual vs collective rights.”¹⁷ National minorities not only expect tolerance rights, which prevents state intervention in individual's private language choices, they additionally claim promotion-oriented rights, which require the use of the minorities' language within state institutions.¹⁸ They have also preferred the establishment of official-language rights regime, as opposed to simple accommodations for their members who lack proficiency in the language of the majority.¹⁹

Of importance to the establishment of a multinational citizenship are the distinctions between personality-based and territoriality-based linguistic rights regimes and the one between individual and collective linguistic rights. Linguistic rights regime can be organized on the territorial principle according to which “languages rights should vary from region to region according to local conditions,” or on the personality principle according to which “citizens should enjoy the same set of (official) language rights no matter where they are in the country.”²⁰ The self-government rights associated with the multinational model imply the capacity to impose a linguistic regime on a delimited territory. As for the collective aspect of language rights, it manifests itself when their enforcement is dependent on a certain threshold level of demand, and therefore the existence of a community, or when their primary intended

¹⁶ Alan Patten & Will Kymlicka, “Language Rights and Political Theory: Context, Issues, and Approaches” in Will Kymlicka and Alan Patten, eds, *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 1 at 5.

¹⁷ *Ibid* at 26.

¹⁸ *Ibid* at 27. See also Heinz Kloss, “Language Rights of Immigrant Groups” (1971) 5:2 *International Migration Review* 250.

¹⁹ Patten & Kymlicka, *supra* note 16 at 27-9.

²⁰ *Ibid* at 29.

beneficiary is a collectivity as opposed to individuals.²¹ The collective goals pursued by national minorities is either linguistic security or survival.²² Significant here are “external protections” which refer to the national minority’s ability to “protect its distinct existence and identity by limiting the impact of the decisions of the larger society.”²³ Measures like these have been implemented by the government of Quebec to limit access to public English schools.²⁴

Quebec's use of external protections has conflicted with the recognition of linguistic rights of the members of its Anglophone minority.²⁵ For Patten and Kymlicka, these rights fall into the collective rights category by virtue of being group-differentiated.²⁶ As Denise G. Réaume explains, the group-differentiated rights of English and French minorities, though they are granted to individuals, aim at protecting language communities.²⁷ However, Anglophones in Quebec have traditionally been more in favour of an undifferentiated citizenship. More specifically, they would have preferred non Quebec state intervention in linguistic matters and the promotion of individuals' equal right to choose the language of their choice in the public sphere. Nonetheless, the very existence of their rights depends upon, or at least is intimately related to, the notion of multinational citizenship. That is, if Quebec did not have important self-government rights as regards language, minority language rights for Anglophones in Quebec would be unnecessary. Also, just like minority language rights given to Francophones outside

²¹ *Ibid* at 30.

²² *ibid* at 31.

²³ Kymlicka, *supra* note 12 at 36.

²⁴ These external restrictions can also be seen as internal restrictions, as they restrict the linguistic rights of Francophone Quebecers, themselves ‘internal’ members of the collectivity being protected. See Newman, *supra* note 15.

²⁵ Denise G. Réaume, “Beyond Personality: The Territorial and Personal Principles of Language Policy Reconsidered” in Will Kymlicka & Alan Patten, eds, *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 271; FL Morton, “Group Rights Versus Individual Rights in the Charter: The Special Cases of Natives and the Québécois” in Neil Nevitte & Allan Kornberg, eds, *Minorities and the Canadian State* (Oakville: Mosaic Press, 1985) 71.

²⁶ Patten & Kymlicka, *supra* note 16 at 30.

²⁷ Réaume, *supra* note 25 at 288. Contra FL Morton, “Group Rights Versus Individual Rights in the Charter: The Special Cases of Natives and the Québécois” in Neil Nevitte & Allan Kornberg, eds, *Minorities and the Canadian State* (Oakville: Mosaic Press, 1985) 71 at 71-2.

Quebec are the extensions of the national minority rights of Francophone-Quebeckers,²⁸ minority language rights given to Anglophone-Quebeckers can be seen as an extension of the rights of the Anglophone Canadian majority.

It is interesting to examine how the different conceptions of citizenship have conflicted and prevailed in Canada over time. Of interest is the province of Quebec's linguistic rights system and its impact on the character of Canadian citizenship as a whole. The following paragraphs will explore three key legal texts that have redefined Quebec's linguistic regime and inevitably influenced the direction in which Canadian citizenship was taken: *The British North America Act, 1867*,²⁹ the *Charter of French Language, 1977*³⁰ and the *Canadian Charter of Rights and Freedoms, 1982*.³¹

First, the adoption of the *British North America Act, 1867* (hereinafter "BNA") established both French and English as the languages of the legislatures³² and the courts through section 133. It also guaranteed, through section 93, rights to denominational schools, which at the time of its enactment were divided along linguistic lines. By doing so, the BNA recognized group-differentiated rights to French-Catholics and English-Protestants. But most importantly, the BNA created Canadian federalism with sections 91 to 95, which relate to the division of powers between the federal government and the provinces. Many argued that the choice of a federal system was made to grant to the province of Quebec the powers necessary for the cultural survival of its Francophone majority within a larger union,

²⁸Kymlicka, *supra* note 12 at 45-46.

²⁹*The British North America Act, 1867* (U.K.), 30 & 31 Victoria, c. 3.

³⁰RSQ 1977, c C-11 [CFL].

³¹*Charter, supra* note 1.

³²The use of French and English are permitted in the Parliament of Canada and the Quebec legislature.

in exchange for its adhesion to the Confederation project.³³ Thus, the powers given to the province of Quebec, notably in the exclusive jurisdictions of education and civil rights, have amounted to self-government rights given to the French Quebecer majority, since it was in control of the provincial state apparatus.³⁴ Moreover, the territorially-based collective rights given to French-Quebeckers signified that Canadian citizenship was to some extent binational.³⁵

Second, the province of Quebec also furthered the differentiation of Canadian citizenship by taking its linguistic destiny in its own hands through self-government means. After the Quiet Revolution, different Quebec governments enacted several pieces of legislation intended to safeguard the vitality of the French language in the province, culminating with the adoption of the *Charter of the French Language, 1977* (hereinafter “CFL”), also known as Bill 101, by the Parti Québécois. This document, which has quasi-constitutional status in Quebec, notably advanced the francization of the work place by requiring that all firms of fifty or more employees operate in French, and by mandating that all public and commercial signs be in French only. It also reduced accessibility to English-language instruction by restricting it to those children whose parents had received primary school instruction in English “in the province of Quebec.”³⁶ Though the language of this provision, known as the “Quebec clause,” was written in individualistic terms, it had a collective purpose. This external protection had been put in place to ensure that immigrant groups, whether from other Canadian provinces or the rest of the world, would integrate into the French majority culture. Concurrently, the Quebec government tried to gain more power over immigration, a federal area of jurisdiction, to favour the establishment of French-

³³See for example Samuel V LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996); Gil Rémillard, *Le fédéralisme canadien: Éléments constitutionnels de formation et d'évolution* (Montréal: Québec/Amérique, 1980).

³⁴Because of this, the terms “government of Quebec” and “French-Quebeckers” are used interchangeably in this paper.

³⁵See especially Joseph Eliot Magnet, “Collective Rights, Cultural Autonomy and the Canadian State” (1986) 32:1 McGill LJ 170.

³⁶CFL, *supra* note 30, s 73(a).

speaking migrants on its territory. To that effect, it signed several bilateral agreements with the federal government in the 1970s.³⁷ Still, the high rate of newcomers' linguistic transfers to English, due to the socio-economic attractiveness of this language as compared to French, had dampened the hope of survival of the French fact in North America. By making French the common and sole language of public life, the CFL consolidated the concept of a distinctive Quebec citizenship within Canada.³⁸

Finally, the *Charter* broke with the spirit of the BNAA by imposing limits on the powers of the Quebec government, and thus the territorial collective rights of French-Quebeckers, notably in the area of language, to the benefit of individual citizens. By promoting an individualised bilingualism as opposed to a territorialized one, it also clashed with the purpose of the CFL. First, the constitutional document guarantees civil rights such as the individual freedom of expression (section 2(b)) and the right to equality (section 15), which forbids discrimination based on ascriptive traits. Second, it confers group-differentiated rights to members of official language minorities (sections 16 to 23). The official language rights, found in sections 16 to 22, give French and English the status of official languages in the operations of the federal government and the government of New Brunswick. They extend the rights found in section 133 of the BNAA and constitutionalize the principles of the *Official Languages Act of Canada, 1969*.³⁹ The addition to the constitutional edifice of Canada of educational rights for members of linguistic minorities, listed under section 23, was a novelty. Though denominational education rights had been protected since Confederation, the courts ruled that they did not include educational linguistic rights.⁴⁰

³⁷The Lang-Cloutier Agreement (1971), the Andras-Bienvenue Agreement (1973), and the Cullen-Couture Agreement (1978).

³⁸Alain-G Gagnon & Raffaele Iacovino, "Interculturalism: Expanding the Boudaries of Citizenship" in Alain-G Gagnon, ed, *Québec: State & Society* (Peterborough: Broadview Press, 2004) 369.

³⁹*Official Languages Act*, 1968-1969, c 54.

⁴⁰*Ottawa Separate Schools Trustees v. MacKell*, [1916] JCI 7, [1917] AC 62; *Bureau métropolitain des écoles protestantes de Montréal v. Ministre de l'Éducation du Québec*, [1976] CS 430, 83 DLR (3d) 645.

While Quebec language policy has been challenged under sections 2(b) and 15, it has mostly been challenged under section 23. At first glance, the detailed nature of Anglophones' educational rights interferes directly with Quebec's constitutional power to legislate in the field of education.⁴¹ For example, section 23(1)(b) of the *Charter*, known as the "Canada clause", had been enshrined specifically to invalidate the "Quebec clause" found in the CFL. The former clause provided that all children whose parents had received primary school instruction in English "anywhere in Canada" had the right to minority language education, and not just "in the province of Quebec." Section 23 rights were thus to be modeled on the personality principle whereby rights are available to individuals irrespective of their geographical location. Though these rights would be exercised individually, they were conditional on the existence of a linguistic community and thus maintain a territorial element.⁴² Section 23(3)(a) notably provides that these rights can only be granted where a sufficient number of rights-holders exist in a particular area to warrant the public funding of educational facilities.⁴³

Nonetheless, the 1982 constitution provides remedial mechanisms for Quebec to protect its self-government rights concerning language policy. First, the *Charter's* drafters exempted Quebec in section 59 of the *Constitution Act, 1982* from having to comply with section 23(1)(a) of the *Charter*. This provision known as the "mother tongue clause" guarantees the right to education in the language of the minority to Canadian citizens whose first language learned and still understood is that of the minority.

⁴¹ *Mandel, supra* note 2 at 142.

⁴² Monahan, *supra* note 3 at 112; Vanessa Gruben, "Language Rights in Canada: A Theoretical Approach" (2008) SCLR (2d) 39 at 115-6.

⁴³ *Charter, supra* note 1, s 23(3) reads as follows: "The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction [...]"

Quebec had tried a mother tongue regime with the adoption of Bill 22 in 1974⁴⁴ and was of the view that it had failed.⁴⁵ Not only was it difficult to apply in practice, it prompted the integration of a majority of Allophones into the English educational system.⁴⁶ The exemption found in section 59 thus consisted in a political compromise between the *Charter's* drafters and Quebec to assuage the latter's concerns.⁴⁷

Second, the limitation clause found in section 1 of the *Charter* provides that rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. In the context of judicial review, the onus is on the government to demonstrate that its impugned legislation withstands a section 1 analysis according to the *Oakes* test.⁴⁸ As Janet Hiebert explained:

An expansive interpretation of section 1 would allow Parliament and the provincial legislatures to promote, where justified, values other than those specifically enumerated in the Charter. This would enrich the Charter by embracing collective values that, like individual rights, are relevant to Canadian

⁴⁴ *Official Language Act*, RSQ 1974, c 6, ss 40-41.

⁴⁵ Jean-Pierre Proulx, “Le choc des chartes: histoire des régimes juridiques québécois et canadien en matière de langue d'enseignement” (1989) 23 RJT 67 at 110-13.

⁴⁶ *Ibid.*

⁴⁷ *Ibid* at 163-67.

⁴⁸ The Supreme Court of Canada developed a test for the application of the limitation clause in *R. v. Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200. The *Oakes* test was later clarified by Justice Iacobucci in *Egan v. Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 at para 182:

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

conceptions of a just and democratic society yet are not adequately captured by the Charter's highly individualist language.⁴⁹

Indeed, section 1 gives Quebec the opportunity to justify limits on individuals' language rights on the basis that they are necessary to allow the province's collective French public culture to flourish.

Third, section 33, better known as the "derogatory clause" or the "notwithstanding clause", can be used by governments to immunise themselves from past or future judicial review under the *Charter*. It stipulates that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."⁵⁰ This clause has a five-year limitation period, after which the concerned government must comply with Charter requirements or re-enact the override. However, the fact that the official language and educational rights of the *Charter* are not subject to the notwithstanding clause, significantly limits Quebec's capacity to affirm its parliamentary authority in language policy matters.

Overall, the adoption of the *Charter* signalled an important step towards an undifferentiation of Canadian citizenship in which primacy was given to the right-bearing equality of individuals as opposed to the self-governing rights of collectivities.⁵¹ Quebec was not able to prevent this ideological turn and would have to face its consequences through *Charter*-based judicial review. While the *Charter* provides

⁴⁹Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal, Buffalo: McGill-Queen's University Press, 1996) at 138.

⁵⁰*Charter*, *supra* note 1, s 33.

⁵¹See especially Jane Jenson, "Citizenship and Equity: Variations across Time and in Space" in Janet Hiebert, ed, *Political Ethics: A Canadian Perspective* (Ottawa: Royal Commission on Electoral Reform and Party Financing and Canada Communications Group, Supply and Services Canada and Dundurn Press, 1991); Pierre Elliott Trudeau, "The Values of a Just Society" in Tom Axworthy & Pierre Elliott Trudeau, eds, *Towards a Just Society: The Trudeau Years* (Markham: Viking, 1990).

an inherent logic to guide judicial review, judicial discretion remains wide as justices can interpret it in a restrictive or non-restrictive fashion. Furthermore, Quebec can influence the outcome of *Charter*-based judicial review with its legislative responses to legal opinions. According to constitutional dialogue theory, elected officials can “revers[e], modif[y], or avoi[d]”⁵² unfavourable judgments. Nevertheless, as will be seen in the next sections, *Charter*-based judicial review in the area of language policy has played in the province’s disfavour.

II. Early Language Rights Jurisprudence: The Path towards Linguistic Peace

All the Supreme Court *Charter* cases in the area of minority language originating from Quebec have challenged important provisions of the CFL. Immediately after the enactment of the *Charter*, the National Assembly retrospectively invoked the notwithstanding clause to protect all of its legislation in *An Act respecting the Constitution Act, 1982*.⁵³ Concretely, all of Quebec’s statutes adopted before the coming into force of the *Charter* were re-enacted to include an override provision to the effect that the statutes would operate notwithstanding a provision included in section 2 or sections 7 to 15 of the *Charter*. However, this blanket override strategy did not prevent the CFL from being challenged under section 23 of the *Charter*. The period that followed took the appearance of a language war that was played out in the courts between the Quebec government and the Anglo-Quebecker community.

⁵²Peter W Hogg & Allison A Bushell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t such a Bad Thing Afterall)” (1997) 35:1 Osgoode Hall LJ 50 at 80; on the topic of constitutional dialogue theory see also Christopher P. Manfredi & James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37:3 Osgoode Hall LJ 513; Matthew Hennigar, “Expanding the ‘Dialogue’ Debate: Canadian Federal Government Responses to Lower Court Charter Decisions”(2004) 37:1 Can J Pol Sc 3; James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: UBC Press, 2005); Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, “*Charter* Dialogue Revisited: Much Ado about Metaphors” (2007) 45:1 Osgoode Hall LJ 1.

⁵³RSQ, cL-4.2.

A. A.G. (Que.) v. Quebec Protestant School Boards (1984)

The first *Charter* case aimed at challenging the CFL under section 23 of the *Charter* was *A.G. (Que) v. Quebec Protestant School Boards*.⁵⁴ The unanimous decision declared that provisions regarding instruction in English found in sections 72 and 73 of the CFL, which made-up the “Quebec clause”, were inconsistent with the “Canada clause” of section 23(1)(b) of the *Charter*. It also argued that the impugned provisions could not be saved under section 1. The Court established that the minority language educational rights found in the *Charter* had been adopted precisely to “remedy the perceived defects” of Quebec’s language policy.⁵⁵ The remedial nature of section 23 of the *Charter* was made clear by the use of a similar terminology and criteria as in the CFL. Consequently, the Court thought the *Charter*’s framers could not have possibly believed the “defects” could be justifiable within the ambit of section 1. Furthermore, the bench pointed out that the framers also had Quebec in mind when they exempted the province from having to comply with the “mother tongue clause” of section 23(1)(a) to address its immigration concerns.

Quebec Protestant School Boards did not significantly increase enrolment in publicly-funded English schools. Pursuant to the unfavourable decisions made by lower courts in the same case, the National Assembly had responded one year earlier with *An Act to amend the Charter of the French Language, 1983*,⁵⁶ also known as “Bill 57.” Its purpose was to consolidate the special status and rights of the Quebec Anglophone community. To begin, Bill 57 widened the admission criteria for English instruction with the

⁵⁴[1984] 2 SCR 66, 10 DLR (4th) 321 [*Quebec Protestant School Boards* cited to SCR].

⁵⁵*Ibid* at 79.

⁵⁶SQ 1983, c 56, amending CFL, *supra* note 30.

introduction of the “major part” requirement.⁵⁷ The new law provided that children whose parents had received the “major part” of their primary education in English in Quebec would have access to public English instruction.⁵⁸ Prior to this amendment, the “Quebec clause” had been interpreted by the governmental admissibility bureau as guaranteeing access to English schools only to children whose parents had received the “totality” of their primary instruction in English in Quebec, while the appeal commission was applying the “major part” requirement.⁵⁹ The Quebec government decided to resolve the conflict in favour of the Anglophone community, which wanted to increase eligibility to English schools.⁶⁰

Furthermore, Bill 57 accepted the “Canada clause,” but imposed two limits on it.⁶¹ Since the enactment of the CFL, the government had constantly given certificates of exemption to allow Canadians who had received their education in English outside of Quebec to send their children to publicly-funded English school, thereby informally enforcing the “Canada clause.”⁶² Bill 57 first legalised this practice, but kept it discretionary as opposed to a guaranteed objective right.⁶³ Second, it added the requirement that to qualify, parents had to have received their English instruction in a province that offered instruction to Francophones, similar to the one offered to Anglophones in Quebec.⁶⁴ At the time, most Canadian provinces had underdeveloped educational systems for Francophone minorities⁶⁵ and

⁵⁷CFL, *supra* note 30, as amended by SQ 1983 c 56, s 73(a), s 73(b), s 86.1(a).

⁵⁸*Ibid.*, s 73(a).

⁵⁹Quebec, Assemblée nationale, *Commissions parlementaires*, 32nd Leg, 4th Sess, vol 27, No 178-202 (13 December 1983) at B-10876 (Camille Laurin).

⁶⁰*Ibid.*

⁶¹CFL, *supra* note 30, as amended by SQ 1983 c 56, s 86.1.

⁶²See Edward McWhinney, *Canada and the Constitution, 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982) at 96.

⁶³CFL, *supra* note 30, as amended by SQ 1983 c 56, s 86.1.

⁶⁴*Ibid.*

⁶⁵Michael D Behiels, *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance* (Montreal, Ithaca: McGill-Queen's University Press, 2004).

only New-Brunswick was deemed to provide adequate minority language education.⁶⁶ Though in theory, the amendment allowed the Quebec government to refuse public English instruction to the children of out-of-province Anglophone Canadians, more importantly it allowed the Quebec government to pressure other Canadian provinces to develop better services for Francophones outside Quebec.⁶⁷

Finally in 1983, Bill 57 attempted to immunise the CFL from future legal challenges by amending it to include a standard override provision.⁶⁸ However, the notwithstanding clause could not be invoked by the Quebec government in the case of *Quebec Protestant School Boards* since section 23 is shielded from its prerogative. It would be used later in response to cases pertaining to freedom of expression.

B. *Ford v. Quebec* (1988) and *Devine v. Quebec* (1988)

The CFL's legislative scheme pertaining to the language of commerce and business was also challenged before the Supreme Court in *Ford v. Quebec(AG)*⁶⁹ and *Devine v. Quebec(AG)*.⁷⁰ In *Ford*, Section 58 which required public signs and posters, as well as commercial advertising to be solely in French and section 69 which mandated firms to use exclusively the French version of their names in the province were found to violate the freedom of expression guaranteed by section 2(b) of the *Charter*. In *Devine*, sections 59, 60 and 61,⁷¹ which created exceptions to section 58, were also found to be of no

⁶⁶RRQ 1984, c C-11, r 2.

⁶⁷At St Andrews in 1977, Quebec Premier René Lévesque was willing to formally implement the "Canada clause" if the English-speaking provinces would reciprocate by guaranteeing access to French schools to Quebecers leaving the province. See McWhinney, *supra* note 62 at 51; Proulx, *supra* note 45 at 124.

⁶⁸CFL, *supra* note 30, as amended by SQ 1983 c 56.

⁶⁹[1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford* cited to SCR].

⁷⁰[1988] 2 SCR 790, 55 DLR (4th) 641.

⁷¹CFL, *supra* note 30, ss 59-61 read as follows: "59) Section 58 does not apply to advertising carried in news media that publish a language other than French, or to messages of a religious, political, ideological or humanitarian nature, if not for a profit motive. 60) Firms employing not over four persons including the employer may erect signs and posters in both French and another language in their establishments. However, the inscriptions in French must be

force or effect since they were connected to the general rule found in section 58. The CFL's only provisions to have escaped judicial invalidation under the *Charter* were sections 52⁷² and 57,⁷³ since they permitted the use of French together with another language, when read with section 89.⁷⁴ In addition, the Court declared that the CFL was only partly protected from the application of section 2(b) of the *Charter* by the standard override provision that had been adopted earlier.

In *Ford*, the bench found that the constitutional freedom of expression included “the freedom to express oneself in the language of one's choice”:

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality.⁷⁵

Freedom of expression was also extended to commercial expression. In *RWDSU v. Dolphin Delivery Ltd*,⁷⁶ the Court had already established that freedom of expression protected by the *Charter* went beyond political expression. Adopting a purposive approach, it decided that commercial expression played a key role in a free and democratic society, that of “enabling individuals to make informed economic choices, an

given at least as prominent display as those in the other language. 61) Signs and posters respecting cultural activities of a particular ethnic group in any way may be in both French and the language of that ethnic group”.

⁷²CFL, *supra* note 30, s 52 reads as follows: “Catalogues, brochures, folders and any similar publications must be drawn up in French”.

⁷³CFL, *supra* note 30, s 57 reads as follows: “Application forms for employment, order forms, invoices, receipts and quittances shall be drawn up in French”.

⁷⁴CFL, *supra* note 30, s 89 reads as follows: “Where this act does not require the use of the official language exclusively, the official language and another language may be used together”.

⁷⁵*Ford*, *supra* note 69 at para 40.

⁷⁶[1986] 2 SCR 573, 9 BCLR (2d) 273.

important aspect of individual self-fulfillment and personal autonomy.”⁷⁷ So while freedom of expression generally could be justified according to the benefits it conferred to the speaker, its extension to commercial expression would be justified by the benefits it conferred to the listeners.

However, extending the freedom of expression to include commercial expression was seen as problematic by the Attorney General of Quebec for multiple reasons. To begin, he argued that since freedom of expression was listed under fundamental freedoms in the *Charter* it had to be fundamental. But according to him, commercial expression was not considered fundamental. The Attorney General of Quebec criticized as well that the Court’s interpretation of freedom of expression which recognized a *de facto* economic right, even though the framers of the *Charter* did not intend this. Furthermore, the Attorney General of Quebec contended that no grounds existed for constitutionally protecting commercial advertising in particular, since its main goal was to condition economic choices rather than truly informing those choices. Finally, the American experience had shown that even a limited recognition of the right to commercial expression required policy evaluation that was a prerogative of the parliament and not of the courts.

In *Ford*, the real test was in deciding whether the CFL’s violation of section 2(b) of the *Charter* constituted a reasonable limit in accordance with section 1. Following the *Oakes* test, the Court agreed that the CFL’s stated objective to protect the quality and influence of the French language was serious and legitimate due to its endangered status in the province:

The causal factors for the threatened position of the French language that have generally been identified are: (a) the declining birth rate of Quebec francophones resulting in a decline in the Quebec francophone

⁷⁷*Ford*, *supra* note 69 at para 59.

proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Quebec by the anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector. These factors have favoured the use of the English language despite the predominance in Quebec of a francophone population. Thus, in the period prior to the enactment of the legislation at issue, the "*visage linguistique*" of Quebec often gave the impression that English had become as significant as French. This "*visage linguistique*" reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community.⁷⁸

The Court also recognized that taking measures, such as signage regulations, to protect Quebec's "*visage linguistique*" were necessary to ensure the predominance of French in the province. However, it determined that the exclusive use of French in commercial advertising was neither a necessary nor a proportionate means to achieve the law's objective. As the Court explained, the Quebec government could have made the use of other languages conditional on the presence of French or required that French be accorded greater visibility than other languages.

While the blanket override used in *An Act respecting the Constitution Act, 1982* had expired when the *Ford* and *Devine* cases appeared before the Supreme Court,⁷⁹ the one contained in *An Act to amend the Charter of the French Language, 1983* had not. After ruling on the validity of that standard override

⁷⁸ *Ibid* at para 72 [emphasis in the original].

⁷⁹ Even though the blanket override contained in *An Act respecting the Constitution Act, 1982* was expired, the Court pronounced itself on the validity of its application in conformity with section 33 of the *Charter* in *Ford*. It was decided that in general, section 33 only allows for prospective derogation and not for retrospective derogation of rights protected by the *Charter*.

provision, the Court established sections 58 and 52 of the CFL were saved but not sections 57, 59 to 61 and 69, to which it did not apply. But since the judges found all the impugned provisions infringed the freedom of expression guaranteed by section 3 the Quebec *Charter of Human Rights and Freedoms*⁸⁰ (hereinafter the “Quebec Charter”), they were all invalidated. *Ford* and *Devine* thus suggest that the *Quebec Charter*, without having a formal constitutional status, could also prevent Quebec from protecting its common language and collective culture due to the similar individualistic nature of some of its rights provisions.

While *Ford* and *Devine* signified advancement of the individual freedom of expression for all Quebecers, in reality they mostly benefited the Anglophone minority whose members brought the cases before the Court.⁸¹ Although those judgments reduced the strength of the CFL, they cannot be said to have shown a total disregard for its cultural objective.⁸² In a fine act of rights balancing, the Court was able to simultaneously uphold Quebec’s self-governing right to protect its “visage linguistique,” and the Anglo-community’s group-differentiated right to function in its own language in its everyday life. However, the rights compromise reached by the Court did not fare well amongst nationalist French-Quebeckers, and even outraged many of them.⁸³

In response to *Ford* and *Devine*, Robert Bourassa, then Premier of Quebec, passed *An Act to amend the Charter of the French language, 1988*,⁸⁴ also known as “Bill 178”. This piece of legislation referred to as the “inside-outside” law, allowed for bilingual advertisement inside commercial establishments with

⁸⁰RSQ, c C-12.

⁸¹See e.g. Jean Claude Galipeau, “National Minorities, Rights and Signs: The Supreme Court and Language Legislation in Quebec” in Alain Gagnon & Brian Tanguay, eds, *Democracy with Justice: Essays in Honour of Khayyam Zev Paltiel* (Ottawa: Carleton University Press, 1992) 66.

⁸²David R Cameron & Jacqueline D Krikorian, “Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process” (2008) 58:4 UTLJ 389.

⁸³Peter H Russell, “Constitutional Odyssey: Can Canadians Become a Sovereign People?” (Toronto: University of Toronto Press, 2004) at 145.

⁸⁴CFL, *supra* note 30, as amended by SQ 1988, c 54.

French preserving a marked predominance, but required the exclusive use of French on all exterior commercial signs. Because the new law went against the verdicts given in *Ford* and *Devine*, the government of Quebec made use of the notwithstanding clause found in both the federal and provincial charters. By enacting Bill 178, the Quebec government decided to affirm its self-governing right in language policy matters. Even though the Anglophone minority had made minor gains under Bill 178, it was seen as a setback in terms of the rights the Supreme Court had granted them. Ironically, the use of the legislative override backfired and created uproar in the Rest of Canada (hereinafter “ROC”). It also led to the demise of the Meech Lake Accord, which would have recognized Quebec as a “distinct society” and eventually put an end to the weakening of its language policy through constitutional litigation.⁸⁵

Before the 5-year derogation expired, the National Assembly passed *An Act to amend the Charter of the French language, 1993*,⁸⁶ also known as “Bill 86”, which conformed to *Ford* and *Devine* by allowing for bilingual interior and exterior commercial signs with a marked predominance of French.⁸⁷ Bill 86 also amended the CFL to have the “Canada clause” officially recognized, irrespective of the quality of francophone minority instruction services in other Canadian provinces.⁸⁸ The amendment also extended the “major part” requirement to section 23(2) of the *Charter* right holders by providing that “a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada” is eligible to publicly-funded English school.⁸⁹ By not requiring that the “totality” of the

⁸⁵See e.g. Patrick Monahan, *Meech Lake: The inside Story* (Toronto: University of Toronto Press, 1991).

⁸⁶SQ 1993, c 40.

⁸⁷CFL, *supra* note 30, as amended by SQ 1993, c 40, s 58.

⁸⁸*Ibid*, s 73(1).

⁸⁹*Ibid*, s 73(2).

education be received in the minority language, Quebec's articulation of the “continuity of education” *Charter* clause widened the criteria of eligibility to public English instruction. Although aware of potential subterfuges, the government thought it unlikely that this modification could lead to a subterfuge whereby wealthy Francophone or Allophone Quebecers would send their children to an English school in nearby Ontario for the first year of their primary school in order to automatically acquire a right to publicly-funded English instruction in Quebec.⁹⁰

These policy amendments to the CFL showed that Quebecers’ mindset was changing and indicated that a certain linguistic peace in the province was possible through compromise.⁹¹ Even though the Quebec government had to make concessions to members of the Anglophone community, it retained the power to integrate immigrants in the public French culture and ensure its preservation on the long term. In that sense, Quebec was able to continue to pursue its ideal of a multinational Canadian citizenship, albeit with reduced means.

III. Recent Language Rights Jurisprudence: The Legal Armistice Challenged

After more than a decade of legal armistice on Quebec's language front, the CFL was once again challenged under the *Charter*. This time however, it was not challenged by Quebec’s historical Anglophone community, but by individual members of the Francophone community⁹² and of the

⁹⁰ Quebec, National Assembly, Commission permanente de la culture, 34th Leg, 2nd Sess, Fascicule No 26 (20 May 1993) at 957-80 (Claude Ryan), online: Nationale Assembly<[http://www.assnat.qc.ca/fr/travaux-parlementaires/journaux-debats/index-jd/recherche.html?cat=ex&Session=jd34l2se&Section=projlois&Requete=CC+957-80&Hier=86++Loi+modifiant+la+Charte+de+la+langue+fran%C3%A7aise+\(1993\)_Audition+publique_CC+957-80](http://www.assnat.qc.ca/fr/travaux-parlementaires/journaux-debats/index-jd/recherche.html?cat=ex&Session=jd34l2se&Section=projlois&Requete=CC+957-80&Hier=86++Loi+modifiant+la+Charte+de+la+langue+fran%C3%A7aise+(1993)_Audition+publique_CC+957-80)> .

⁹¹ José Woehrling, “La Charte de la langue française: Les ajustements juridiques” in Michel Plourde, ed, with the collaboration of Hélène Duval & Pierre Georgeaults, *Le français au Québec: 400 ans d'histoire et de vie* (Saint-Laurent: Fides, 2000) 354.

⁹² Gosselin, *supra* note 7; Solski, *supra* note 8.

Allophone community.⁹³ As will be discussed, these challenges have undermined Quebec's self-government rights and brought about a greater undifferentiation of Canadian citizenship.

A. *Gosselin v. Quebec* (2005)

In *Gosselin*, section 73 of the CFL once again came under attack. This time, Francophone parents⁹⁴ who did not qualify as rights holders under section 23 of the *Charter* were claiming that section 73 was discriminatory towards the majority of French-speaking children by refusing them access to publicly-funded English instruction and by denying, in general, freedom of choice with regards to language of instruction in Quebec. The appellants contended that the CFL violated the equality rights protected in the *Quebec Charter*. Even though the Supreme Court dismissed their appeal under the provincial charter, it judged necessary to assess whether such a challenge should also be dismissed under the federal one. In a unanimous decision, the Court held that the CFL did not infringe the equality rights protected in section 15 of the Canadian *Charter*.

Even though “maternal language” had been recognized as an analogous ground for discrimination under section 15 of the *Charter* by the Quebec Superior Court in *Quebec v. Les Entreprises W.F.H. Itée*,⁹⁵ the justices considered that it was not the content of section 15 that was at stake in *Gosselin* but rather its relationship with the positive language guarantees given to minorities in section 23 of the *Charter* and section 73 of the CFL. Similarly to *Mahe v. Alberta*,⁹⁶ the Court found that universal individual rights such as those found in section 15 of the *Charter* could not be invoked to nullify the special status given

⁹³ *Solski*, *supra* note 8; *Nguyen*, *supra* note 9.

⁹⁴ Out of the sixteen appellants in *Gosselin*, only two had not been born in Quebec and had not received their primary education in French; *Gosselin*, *supra* note 7 at para 3.

⁹⁵ [2000] RJQ 1222, JE 2000-860 (CS).

⁹⁶ [1990] 1 SCR 342, 68 DLR (4th) 69 [*Mahe* cited to SCR].

to the English and French groups protected by sections such as section 23. Furthermore, it found as in *Arsenault-Cameron v. Prince Edward Island*, that special treatment given to linguistic minorities in section 23 was not an exception to section 15: it was not a violation of equality, but rather the application of substantive equality.⁹⁷ The Court thus established that there was not a hierarchy amongst constitutional rights and that the text of the *Charter* had to be understood comprehensively.

The Court also argued that the principle of freedom of choice with regards to language of instruction was not supposed to be recognized within the ambit of section 23 according to the *Charter's* framers. The framers were concerned that giving members of the linguistic majority access to minority language schooling, especially outside Quebec, would transform minority language schools into "assimilation centers" where members of the majority would outnumber members of the minority.⁹⁸ In the Quebec context, the framers were additionally worried that such a policy would "operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole."⁹⁹ Since section 73 of the CFL as amended in 1993 was the legislative articulation of the constitutional right found in section 23 of the *Charter*, the Court argued it could not be opposed to section 15 of the *Charter*.

Gosselin resulted in the preservation of the legislative status quo. Graham Fraser believes the case demonstrated that the *Charter* is sensitive both to Quebec's desire to retain control over its education policy and to the rights of linguistic minorities to thrive.¹⁰⁰ However, the Court justified its decision

⁹⁷2000 SCC 1, [2000] 1 SCR 3.

⁹⁸*Gosselin*, *supra* note 7 at para 31.

⁹⁹*Ibid* at para 31.

¹⁰⁰Graham Fraser, "Canadian Language Rights: Liberties, Claims, and the National Conversation" in Christopher P Manfredi & James B Kelly, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*(Vancouver: UBC Press, 2009) 167.

mainly on the basis that the impugned provision of the CFL was protecting the group-differentiated right of the members of the Anglophone community in Quebec, and indirectly the group-differentiated right of the members of Francophone communities outside Quebec, rather than the National Assembly's self-government right. Even though the *Gosselin* ruling played in favour of Quebec, it can be asked if the parallel jurisprudential treatment of Francophone and Anglophone linguistic minorities in Canada can undermine the vitality of French in Quebec in other instances.

B. *Solski v. Quebec* (2005)

Members of the linguistic French majority and members of the Allophone community were more successful in challenging the CFL under the *Charter* in *Solski*. At issue was the constitutionality of section 73(2) of the CFL, which specifies that only the children who have completed the "major part" of their education in English should have access to publicly-funded education in English. In the appellants' view, this provision violated section 23(2) of the *Charter*, which provides that "[c]itizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language."¹⁰¹ In a unanimous decision, the bench concluded that section 73(2) of the CFL did not infringe the rights protected in section 23(2) of the *Charter* when properly interpreted and determined that the appellants should have qualified for instruction in a publicly-funded English school.

To determine whether a child had completed the "major part" of his or her education in English, the Quebec government would simply calculate if the child had spent more months in the English schooling system than in the French one. The authorities would also apply the "major part" criteria disjunctively, considering the time spent at the elementary level separately from the time spent at the

¹⁰¹*Charter*, *supra* note 1, s 23(2).

secondary level. In the Court's view, this strictly mathematical interpretation of the "major part" requirement was incompatible with the purpose of section 23(2) of the *Charter*. The Court believed the framers of the *Charter* intended for this guarantee to "provide continuity of minority language education rights, to accommodate mobility and to ensure family unity."¹⁰² Section 23(2) did not specify the time a child had to spend in a minority language school system in order to benefit from the constitutional guarantee.

Rather, the Court found that section 23(2) required for the child to have a sufficient connection with the language of the minority – in other words, the child needed to have spent a "significant part" of his educational pathway in the language of the minority. Furthermore, this connection had to be assessed both subjectively and objectively. The Quebec government would need to ask: "Subjectively, do the circumstances show an intention to adopt the minority language as the language of instruction? Objectively, do the educational experiences and choices to date support such a connection?"¹⁰³ The Court thus preferred a qualitative evaluation of a pupil's genuine commitment to minority language instruction, that would take into account notably "the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist."¹⁰⁴ Only by adopting such an approach would section 23(2) of the CFL be considered constitutional.¹⁰⁵ The Quebec government's compliance with the "significant part" approach was officialised by regulation in 2010.¹⁰⁶

Solski also tackled the question of immersion programs and determined whether they could be equated with minority language education for the purpose of section 23(2) of the *Charter*. Because she

¹⁰² *Solski*, *supra* note 8 at para 30.

¹⁰³ *Ibid* at para 40.

¹⁰⁴ *Ibid* at para 33.

¹⁰⁵ *Contra* Peter W. Hogg, *Constitutional Law of Canada*, 2013 Student Edition (Toronto: Carswell, 2013) at 56.8(f).

¹⁰⁶ RRQ 2010, c C-11, r 2.1 [RRQ 2010].

had not received the majority of her education in English, the Quebec government had refused to give Shanning Casimir access to publicly-funded English school in Quebec after she had attended a French immersion program in Ontario. The Supreme Court reversed this decision by declaring that French immersion programs do not qualify as Francophone minority education. Casimir was thus found to be more connected to the Anglophone culture than the Francophone culture:

Outside Quebec, immersion programs are designed to provide second language training to children attending schools designed for those adopting the language of the majority. Immersion programs occur in a majority setting where the majority language is spoken in the corridors and during extra-curricular activities. Immersion programs are run in majority schools that are a part of the majority school system.¹⁰⁷

Furthermore, the justices in *Solski* specified that “[s]ection 23(2) in particular facilitates mobility and continuity of education in the minority language, though change of residence is not a condition for the exercise of the right.”¹⁰⁸ Two out of the three appellant families whose children were deemed to qualify for publicly-funded English instruction in *Solski* had not moved from a Canadian province to Quebec. The *Solski* family had moved from Poland to Quebec and had been granted permission to send their children to publicly-funded English schools under the basis that their stay in Quebec was supposed to be temporary. Finally, the family decided to settle permanently in Quebec and sought permanent eligibility to attend English school for their children. In the case of the Lacroix family, one daughter had completed her first two years of her primary education in private French school but had opted to continue her education in an English private school.

¹⁰⁷*Solski*, *supra* note 8 at para 50.

¹⁰⁸*Solski*, *supra* note 8 at para 33.

By adopting a broad and purposive approach in interpreting the meaning of 23(2), the Court determined that this constitutional guarantee was not only for members of the official linguistic minority as conventionally defined, but also for members of the Allophone community and the linguistic majority. Thus in *Solski*, the Court was more concerned with the individual rights of children in general to have continuous education than with protecting Quebec's self-governing right to promote French culture. However, even before the decision in *Solski* was delivered, the Quebec government had adopted *An Act to amend the Charter of the French language, 2002*¹⁰⁹ (also known as "Bill 104") under which the children of the *Solski* and *Lacroix* families would not have qualified for public English instruction. The constitutionality of these amendments would later be assessed by the Supreme Court of Canada in *Nguyen*.

C. *Nguyen v. Quebec* (2009)

Nguyen is the final case of a series of legal challenges aimed at vindicating minority language education rights over Quebec's legislative power. At issue in *Nguyen* was the constitutionality of paragraphs 2 and 3 of section 73 of the CFL, regarding the eligibility to attend publicly subsidized English school in Quebec. These provisions were added by Bill 104 in order to counter the effects of so-called "bridging-schools": parents whose children were not entitled to receive publicly-funded education in English according to section 23(1) of the *Charter*, would enroll them in unsubsidized English schools for a few weeks or months for the purpose of automatically acquiring the right to publicly-funded English-language education for them thanks to section 23(2). This trend had been increasing at the turn of the century, especially among the members of the Allophone community. Paragraph 2 of section 73 establishes that time spent in an unsubsidized English school cannot be taken into account when

¹⁰⁹CFL, *supra* note 30, as amended by SQ 2002, c 28.

determining if a child, his siblings or his descendants, can have access to a publicly subsidized English school. Paragraph 3 of section 73 specifies that the same rule is applicable for schooling received in English following an authorization given by the province in special cases where the child has a serious learning disability, is temporarily residing in Quebec, or is in an exceptional family or humanitarian situation. The Quebec government did not want the siblings and the descendants of those benefiting from these exemptions to subsequently earn the constitutional right to attend public English school, due to the circumstantial character of the exemption.¹¹⁰

In a unanimous judgment, the Court decided that paragraphs 2 and 3 of section 73 of the CFL infringed section 23(2) of the *Charter*. The Court pointed out that this constitutional right does not specify whether the education received or being received has to be private or public, nor does it mention according to which type of authorization it needs to have been granted. On the contrary, the Court believed that section 23(2) alludes to the factual instruction of a child received in one of Canada's two official languages. As Justice Lebel writing for the Court argued: "The inability to assess a child's educational pathway in its entirety in determining the extent of his or her educational language rights has the effect of truncating the child's reality by creating a fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees."¹¹¹

As determined in *Solski*, eligibility for instruction in the language of the minority was conditional on the child's educational pathway being "genuine". For the Court, this meant that the evaluation of a child's pathway had to be comprehensive, but also had to recognize when attendance at a school was used solely to artificially acquire an educational minority language right. The judges acknowledged that a

¹¹⁰ Quebec, National Assembly, Journal des débats de la Commission de la culture, 36th Leg, 2nd Sess, vol 37, No 42 (31 May 2002) (Diane Lemieux), online: National Assembly<<http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/cc-36-2/journal-debats/CC-020531.html>>.

¹¹¹ *Nguyen*, *supra* note 9 at para 33.

literal interpretation of section 23(2) might lead to a return to the principle of freedom of choice of the language of instruction in Quebec, which they did not consider to be the intent of the *Charter's* drafters.

Furthermore, the Court found that the impugned provisions of the CFL did not withstand a section 1 analysis. While the objective of the law was found to be pressing and substantial, the means chosen were found to be excessive under the proportionality requirement of the *Oakes* test. In *Ford*, the Court had already recognized the importance for the province of Quebec to protect the French language and realized that the “bridging-schools” were compromising this objective. However, the Court thought paragraphs 2 and 3 of section 73 of the CFL did not minimally impair the constitutional rights of the appellants. While the number of children who become eligible for publicly-funded English education after having attended a privately-funded English school is increasing, the overall number remains low in proportion to the number of children enrolled in the educational system according to the bench. For that reason, Justice Lebel stated that “the absolute prohibition on considering an educational pathway in [an unsubsidized private school] seem[ed] overly drastic.”¹¹² The Court concluded that in reality there was not a return to freedom of choice, and that other solutions, such as the contextual approach referred to in *Solski*, were available to Quebec’s national Assembly to deal with the problem of the “bridging-schools”.

In addition, paragraph 3 was found to be incompatible with the principle of preserving family unity provided for in section 23(2) of the *Charter*. In the case at hand, one of the appellants was not able to secure eligibility for instruction in English for his son even though his daughter was attending a school in the publicly-funded English system pursuant to a special authorization. By granting special authorizations to attend publicly-funded English schools to certain children, the government was

¹¹²*Ibid* at para 42.

exceeding its constitutional obligations. But once this was done, the Court considered that the government could not limit the constitutional rights derived from such authorizations.

Just like in *Solski*, in *Nguyen* the right of eligibility to publicly-funded English instruction for certain categories of individuals was promoted to the detriment of the self-governing right of Quebec to protect the vitality of the French language. While the court was careful to say that the educational pathway would need to be genuine rather than artificial, in reality the invalidation of paragraph 2 of section 73 of the CFL granted the economic right for individuals to buy their children and generations to come a legal status as a member of one of Canada's official linguistic minority community. *Nguyen* therefore undeniably increased the possibility of language substitution to the benefit of English and took from the Quebec government a policy tool that would have been helpful in integrating new comers into the French public culture.

Even though some, like the Leader of the Official Opposition Pauline Marois, summoned the government to invoke the notwithstanding clause in response to *Nguyen*, the government could not do so since section 23 is not subject to it. Having no other option, Quebec was constrained to comply with the Supreme Court's judgment. The Charest government thus adopted *An Act following upon the court decisions on the language of instruction, 2010*,¹¹³ also known as "Bill 115." Bill 115 essentially complied with the *Solski* and *Nguyen* decisions by allowing the government to determine, by way of regulation, the analytical framework that must be used in assessing the eligibility to publicly-funded English schools. To that effect, the adopted regulations take into account the time spent in an unsubsidized English school in assessing the educational pathway of students.¹¹⁴ Even though Bill 115 considered illegal the setting-up or the operatorship of an educational establishment for the purpose of circumventing the

¹¹³RSQ 2010, c 23.

¹¹⁴RRQ 2010, *supra* note 106.

principle of French instruction, the new regulations provide that three years spent in an unsubsidized English school are sufficient to guarantee access to publicly-funded English school. In 2012, Pauline Marois ran on the promise to put an end to the “bridging schools,” but during its term in government, the Parti québécois failed to propose legislation on the matter. This begs the question of whether or not Quebec has exhausted its legislative counter-attacks to unfavorable judicial decisions in the area of language.

IV. Analysis

An analysis of the Supreme Court's *Charter*-based review of the CFL reveals that Quebec is increasingly losing relevance in the constitutional politics of language. In all its judgments, the Court unanimously secured the group-differentiated rights of the Anglophone minority and increasingly the rights of individual Allophones and Francophones, against the democratic will of the Quebec majority. Even in *Gosselin*, which favoured the Quebec government, the main justification given for the decision was the need to protect linguistic minorities rather than protecting French-Quebeckers' collective interest. This state of affairs can be attributed to three factors: the move towards an implacable parallel constitutionalism, a redefinition of official linguistic minority rights, and the exhaustion of legislative counterattacks.

A. The Move Towards an Implacable Parallel Constitutionalism

This preference for Anglo-Quebeckers group rights can be explained by the “constitutional parallelism” approach the Court has adopted with regards to the interpretation of minority language rights.¹¹⁵ This approach consists of treating linguistic minorities equally regardless of their official spoken language. Section 23 of the *Charter* specifically refers to the protection of provincial linguistic minorities - namely Francophones outside Quebec and Anglophones inside Quebec - and not to the protection of French, which is a minority language in Canada as a whole. The latter would warrant an asymmetrical treatment of linguistic minorities which, in practice, would entail protecting the rights of Francophones outside Quebec and protecting the use of French in Quebec, even if it meant limiting the rights of other linguistic minorities within that province. Although the legitimacy of constitutional parallelism can be justified by the very wording and structure of the linguistic rights provisions found in the *Charter*, the Supreme Court's reliance on this principle as a method of interpretation has become increasingly important. In interpreting minority language educational rights, the Court seems to have been mainly concerned with the situation of Francophones outside Quebec and how its jurisprudence on the CFL may affect it, rather than with the lot of French in Quebec. To better understand why, recent jurisprudence needs to be read in conjunction with other minority-language case law outside Quebec, notably *Abbey v. Essex County Board of Education*¹¹⁶ and *Whittington v. Saanich Sch. Dist.* 63.¹¹⁷

In *Abbey*, the Abbey children did not qualify for minority language education under section 23(1) of the *Charter*. Their mother Susan Abbey had English as her first language and had received her primary school education in English. Nicholas Abbey, the eldest son, had nonetheless attended a French minority

¹¹⁵See especially Carolyn J Tuohy, *Policy and Politics in Canada: Institutionalized Ambivalence* (Philadelphia: Temple University Press, 1992); Claude Ryan, “L'impact de la Charte canadienne des droits et libertés sur les droits linguistiques au Québec”(2003) Numéro spécial R du B 543.

¹¹⁶1999 ONCA 3693, 42 OR (3d) 481 [*Abbey* cited to ONCA].

¹¹⁷1987 2642 BCSC, 44 DLR (4th) 128 [*Whittington* cited to ONCA].

school pursuant to the decision of an admissions committee.¹¹⁸ Thanks to section 23(2), his siblings had also been able to attend a French minority school. When the family moved from London to Essex County, the children were denied access to minority language instruction by the local school board on the basis that they did not originally qualify for it under section 23(1). The Court of Appeal of Ontario found in favour of the Abbey family by declaring that section 23(2) extends to parents who are not necessarily connected linguistically and/or culturally to the linguistic minority group of their province of residence. It also decided that the exercise of section 23(2) rights was not conditional on interprovincial migration. As Justice Abella explained:

For purposes of s. 23(2), it does not matter whether this prior language instruction originated in another province, another part of a province, or through the kind of admissions committee contemplated by the Education Act. However it originated, it is the fact of it having occurred which attracts the protection of s. 23(2).¹¹⁹

Justice Abella sympathised with Francophone minorities' desire to grow their ranks with individuals who may not have initially a cultural and linguistic connection to them.¹²⁰ She recognized that “[t]he more fluency there is in Canada's official languages, the more opportunity there is for minority language groups to flourish in the community.”¹²¹ By confirming the *Abbey* decision in *Solski* and *Nguyen*, albeit without explicitly referencing it, the Supreme Court of Canada showed its preference for the well-being of provincial minorities over provincial majorities. If it had ruled in favour of Quebec, it would have endangered the future vitality of Francophone minorities outside Quebec.

¹¹⁸Section 289 of the *Education Act*, RSO 1990, c E2 provides that Ontarian minority language schools can admit pupils that do not qualify under section 23 of the *Charter*.

¹¹⁹*Abbey*, *supra* note 116 at para 25.

¹²⁰José Woerhling, “La contestation judiciaire de la politique linguistique du Québec en matière de langue d'enseignement” (2005) 44 *Revisa de Llengua* 101 at 122 [Woerhling, “Contestation Judiciaire”].

¹²¹*Abbey*, *supra* note 116 at para 29.

Increasing enrolment in minority language schools can be highly beneficial for Francophone minorities; a greater number of pupils can help attain the sufficient number to warrant the right to instruction in the language of the minority in certain areas under section 23(3) of the *Charter*, and justify more funding for existing educational facilities.¹²² However, opening the doors of minority language schools to the members of the linguistic majority can turn these into assimilation centers. Therefore, the Supreme Court was careful to strike a balance between increasing enrolment and preventing assimilation. In *Gosselin*, the main justification given to disallow freedom of choice with regards to language of instruction in Quebec was the need to protect linguistic minorities. That members of the Anglo-Quebec community would assimilate into the French majority, were freedom of choice sanctioned, seems however questionable considering the assimilating force of English in North America. Before Bill 22, when freedom of choice existed in Quebec, Anglophones were certainly not assimilated. The Supreme Court's concern for assimilation only makes sense in the context of Francophones outside Quebec. Its decision in *Gosselin* does, as a matter of fact, refer directly to *Abbey* to support the argument that freedom of choice does not fall within the purpose of section 23.¹²³

Though the Supreme Court's desire to prevent assimilation of Francophone minorities did not play in Quebec's disfavour in *Gosselin*, it did so in *Solski*. Here, the justices specified that French immersion programs do not qualify as minority language education under section 23(2) of the *Charter*. By doing so, they were confirming the decision made in *Whittington*, again without explicitly referencing it. In this case, parents whose children had received education in a French immersion program were claiming the right to have all their children instructed in French-language minority schools. In its decision, the Supreme Court of British Columbia stated that a French immersion program cannot qualify

¹²²Woerhling, *Contestation Judiciaire*, *supra* note 120 at 123.

¹²³*Gosselin*, *supra* note 7 at para 30.

as minority language education because “[i]n that programme French is taught as a second language, recognizing English as the primary or first language.”¹²⁴ The Supreme Court of Canada corroborated this idea and added that an important “cultural element”¹²⁵ was involved in minority language education. As it had affirmed in *Mahe*, “minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture.”¹²⁶ To recognize attendance in a French immersion program as a ticket to French minority language education would jeopardise the future cultural unity of Francophone minority schools. This reasoning resulted in widening the criteria of eligibility to Anglophone minority school in cases like that of Shanning Casimir who had attended French immersion in Ontario prior to moving to Quebec.

The use of the limitation clause found in section 1 of the *Charter* has been identified as a way to transcend the symmetry associated with language rights, to simultaneously promote Francophone minorities and French within Quebec,¹²⁷ yet, constitutional parallelism has increasingly guided the Supreme Court's section 1 analysis. In the earlier jurisprudence, the necessity for Quebec to preserve its French culture was recognized under the limitation clause. In *Ford*, the requirement for unilingual French public signs could not be saved under section 1, but the justices allowed for the predominance of French in public signage, due to Quebec's particular linguistic situation.¹²⁸ It is unlikely that such a decision would have been rendered outside Quebec. There is simply no substantial and pressing need to have a mandatory use of English in public signage.

¹²⁴ *Whittington*, *supra* note 117 at para 33.

¹²⁵ *Solski*, *supra* note 8 at para 50.

¹²⁶ *Mahe*, *supra* note 96 at 363.

¹²⁷ Michel Bastarache, “Asymmetrical Federalism and Official Languages” delivered at the McLachlin Court’s First Decade: Reflections on the Past and Projections for the Future conference, June 19 2009 [online: The Canadian Bar Association <http://www.cba.org/cba/cle/PDF/Constit09_Bastarache_paper.pdf>]; Woerhling, *Contestation Judiciaire*, *supra* note 120.

¹²⁸ *Ford*, *supra* note 69 at para 72-73.

In its more recent jurisprudence, the Supreme Court recognized the need for a certain asymmetrical treatment of language rights, but to no avail. The Court established in *Solski* that, despite its uniform approach to linguistic rights, the socio-historical context of each province had to be taken into account when implementing those rights under section 1.¹²⁹ However, since the justices upheld the constitutionality of the CFL by reading down its section 73(2), it avoided submitting the mathematical approach to the “major part” requirement to a section 1 analysis. This prevented Quebec from using the opportunity to justify a limitation of rights guaranteed by section 23(2) of the *Charter*. Finally, the Court could have showed more concerns in *Nguyen* for Quebec's unique context under section 1. The worrisome phenomenon of “bridging schools” has not been witnessed in the ROC. Ultimately, the justices did not save the impugned provisions of Bill 104 under the limitation clause, even though there was interpretative space for such a constitutional reading. The “proportionality” requirement of the *Oakes* test seems to have been fatal to Quebec’s claim of reasonably limiting language rights in this case.

B. A Redefinition of Official Linguistic Minority Rights

Official minority linguistic rights have been significantly redefined since the enactment of the *Charter*, to the detriment of Quebec. More specifically, the jurisprudence of the Supreme Court of Canada has given way to the individualisation of the educational rights found in section 23 of the *Charter*. Originally, minority educational rights had been constitutionally enshrined to protect Canada's historic linguistic minorities.¹³⁰ Although Prime Minister Pierre-Elliott Trudeau had a clear preference for the adoption of the individual freedom of choice in education, he soon realised that it would not rally

¹²⁹*Solski*, *supra* note 8 at para 21.

¹³⁰Proulx, *supra* note 45 at 46.

support in Quebec as Quebec was scared that for economic reasons, such a principle would encourage members of the Francophone majority and of the Allophone minority to choose to have their children educated in English. Trudeau consequently opted for the protection of official language minority group rights, which was supported by the Liberal Party of Quebec. The intent of Trudeau is made clear in this governmental statement explaining the nature of minority educational rights in the 1980 constitutional package:

This constitutional right to choose would not apply to non-citizens, or to citizens who belong to the official language majority population of the province. Thus a province would remain free to place the children of immigrants in the majority language school system of the province and to require children who are members of the language majority of that province to receive their education in that language.¹³¹

As previously mentioned, to further protect the province of Quebec's capacity to channel pupils into the French education system, the province was exempt from the application of the "mother tongue clause" found in section 23(1)(a) of the *Charter*. Therefore, the application of section 23 of the *Charter* in Quebec principally targeted the historic Quebec Anglo-community. Most children who had a guaranteed right to publicly-funded English instruction were those whose parents had received instruction in English in Quebec, and thus had strong roots in the historic Quebec Anglo-community. Section 23(1)(b) also gave access to publicly-funded English schools to those children whose parents had received instruction in English in the rest of Canada. Though the latter would have "weaker roots" to the historic Anglophone community, they would have "strong roots" to the Canadian Anglo-community and their integration in Quebec's historic Anglo-community would be organic, considering the natural tie that binds the English

¹³¹Canada, *The Canadian Constitution 1980: Explanation of a Proposed Resolution Respecting the Constitution of Canada* (Ottawa: Publications Canada, 1980) at 15.

community outside Quebec and Anglo-Quebeckers. Children without “strong roots” in the Quebec or Canadian Anglo-community could exceptionally gain access to publicly-funded English instruction via section 23(2). This provision’s initial draft however made continuity of education for linguistic minorities conditional on interprovincial migration.¹³² It provided that Allophone or Francophone pupils that had attended English school outside Quebec would subsequently be able to attend publicly-funded English education in Quebec, but not those who had spent a certain period of time in the Quebec private English education system. Therefore, section 23(2) children’s integration in Quebec’s historic Anglo-community would also be organic, rather than deliberate and artificial.

However, the condition of interprovincial migration in section 23(2) was removed in the final constitutional package of 1982 at the request of liberal senator Pietro Rizzuto and the National Congress of Italian-Canadians.¹³³ As amended, the provision states that “Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.”¹³⁴ In demanding this change, the Italian community was pursuing two objectives.¹³⁵ First, it wanted to constitutionalise the acquired rights of Allophones in Quebec.¹³⁶ Paragraphs c) and d) of section 73 of the CFL allowed Allophones who were enrolled in an English school at the time of the passage of the CFL to maintain their enrolment, regardless of the fact that their parents had not

¹³²Section 23(2) of the proposed resolution respecting the Constitution of Canada reads as follows:

Where a citizen of Canada changes residence from one province to another and, prior to that change, any child of that citizen has been receiving his or her primary school instruction in either English or French, that citizen has the right to have any or all of his or her children receive their primary and secondary school instruction in the same language if the number of citizens resident in the area of which the citizen has moved, who have the right recognized by this section, is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

Canada, *The Canadian Constitution 1980: Proposed Resolution Respecting the Constitution of Canada* (Ottawa: Publications Canada, 1980).

¹³³Proulx, *supra* note 45 at 155.

¹³⁴*Charter*, *supra* note 1, s 23(2).

¹³⁵Proulx, *supra* note 45 at 155-57.

¹³⁶*Ibid.* at 155.

received instruction in English in Quebec.¹³⁷ Second, the Italian community wanted to normalise the situation of about 1500 pupils, mostly of Italian origin, who were illegally receiving public instruction in English in Quebec since the enactment of the CFL.¹³⁸ Ironically, the amendment of section 23(2) according to the wishes of the Italian community was never able to solve the problem of illegal instruction in Quebec.¹³⁹ This problem had to be separately addressed in 1986 by the adoption of *An Act respecting the eligibility of certain children for instruction in English*, also known as Bill 58.¹⁴⁰

As rewritten, section 23(2) opened the door to children acquiring a constitutional right to attend public minority language schools after having spent a certain period of time in an unsubsidized private minority language school, thereby legalising the concept of “bridging schools.”¹⁴¹ However, no available documentation shows that the *Charter* drafters and the Italian community were considering this legal stratagem at the time of its amendment.¹⁴² While, the goal of the change was the constitutional protection of the acquired rights of Allophones in Quebec,¹⁴³ the seeds of the present individualisation of minority educational rights had been planted.

Though the rights conferred by section 23 were couched in individualist terms,¹⁴⁴ they were initially given a collective meaning in the jurisprudence. In *Mahe*, the Supreme Court had determined that section 23’s general underlying purpose was twofold: first, the preservation and flourishing of official language minority cultures, and second, the correction of past injustices endured by official language

¹³⁷ CFL, *supra* note 30, ss 73(c)-73(d).

¹³⁸ Proulx, *supra* note 45 at 156.

¹³⁹ *Ibid.*

¹⁴⁰ *An Act respecting the eligibility of certain children for instruction in English*, LQ 1986, c 46.

¹⁴¹ Proulx, *supra* note 45 at 156.

¹⁴² *Ibid.*

¹⁴³ *Ibid.* at 156-57.

¹⁴⁴ The exception to this assessment would be section 23(3) which posits that the rights contained in sections 23(1) and 23(2) apply only “where numbers warrants,” meaning minority language education services will only be provided where there exists a significant minority language community. See Patrick Monahan, “Politics”, *supra* note 3 at 112.

minorities.¹⁴⁵ As per Chief Justice Dickson, “[s]ection 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures [emphasis added].”¹⁴⁶ The constitutional objective pursued by minority educational rights informed subsequent Supreme Court of Canada outside Quebec section 23(1) jurisprudence,¹⁴⁷ as well as lower courts outside Quebec section 23(2) jurisprudence.¹⁴⁸ Quebec had no problem guaranteeing its historic Anglophone community collective group rights and section 23 extended to Francophones outside Quebec somewhat similar rights Anglophone Quebecers already enjoyed under the CFL. However, the recognition of purely individual rights under section 23 of the *Charter* in *Solski* and *Nguyen* were seen by Quebec as more problematic.

In *Solski*, the Court changed its understanding of section 23 of the *Charter* rights by asserting that they were primarily individualistic in nature:

Section 23 is clearly meant to protect and preserve both official languages and the cultures they embrace throughout Canada; its application will of necessity affect the future of minority language communities. Section 23 rights are in that sense collective rights. The conditions for their application reflect this (*Doucet-Boudreau*, at para. 28): implementation depends on numbers of qualified pupils (*Mahe*, at pp. 366-67; *Reference re Public Schools Act (Man.)*, at p. 850; *Arsenault-Cameron*, at para. 32). Nevertheless, these rights are not primarily described as collective rights, even though they presuppose that a language community is present to benefit from their exercise. A

¹⁴⁵ *Mahe*, *supra* note 96.

¹⁴⁶ *Mahe*, *supra* note 96 at 365.

¹⁴⁷ *Reference re Public Schools Act (Man)*, s 79(3), (4) and (7), [1993] 1 SCR 839, 100 DLR (4th) 723 [*Public Schools Act* cited to scr]; *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3.

¹⁴⁸ *Abbey*, *supra* note 116 .

close attention to the formulation of s. 23 reveals individual rights in favour of persons belonging to specific categories of rights holders [emphasis added].¹⁴⁹

In this statement, the Court limited the collective aspect of section 23 to its subsection 23(3), which deals with the number of minority language pupils needed to warrant the establishment of minority language educational infrastructure. The characterization of subsections 23(1) and 23(2) as strict individual rights is a new phenomenon.¹⁵⁰ The reasons given in *Solski* and *Nguyen* to advocate the right of Allophone and Francophone Quebecers to instruction in the language of the minority, in certain circumstances, differed greatly from those given earlier to defend the same right for Francophones outside Quebec. In *Solski*, the Court asserted that the reason for being of the “continuity of language instruction” clause found in section 23(2) was to reward an individual’s “genuine commitment to a minority language education,”¹⁵¹ rather than to protect the Anglo-Quebecker community.¹⁵² Furthermore, granting eligibility to publicly-funded English instruction to children of Allophones and Francophone in Quebec does not amount to countering assimilation of the Anglo-Quebecker community nor does it redress past linguistic injustices, except for not being able to recruit new members. Rather, it precludes Quebec from using a powerful policy tool for the survival of its French public culture.

C. The Exhaustion of Legislative Counterattacks

¹⁴⁹ *Solski*, *supra* note 8 at para 23.

¹⁵⁰ *Contra* Vanessa Gruben, *supra* note 42 at 117-19. Nicolas M. Rouleau believes *Solski* depicts subsections 23(1) and 23(2) as simultaneously individual and collective: “The right [in Section 23] is ‘individual’ because it allows individual members of the minority to fulfill their personal aspirations of their own language. The right is ‘collective’ because it intends to promote the development of minority-language communities throughout Canada [...]”. See Nicolas M. Rouleau, “Section 23 of the Charter: Minority-Language Education Rights” in Joseph Eliot Magnet, *Official Languages of Canada: New Essays* (Markham: LexisNexis, 2008) 261 at 292-93.

¹⁵¹ *Solski*, *supra* note 8 at para 28.

¹⁵² Henri Brun, “La Cour suprême du Canada et le droit à l’école publique anglaise au Québec” (2006) 1 Bulletin québécois de droit constitutionnel 18 at 21.

Since the enactment of the *Charter*, the National Assembly has been increasingly unsuccessful at counteracting the effects of the Supreme Court's jurisprudence on the CFL in order to protect and promote the French language in Quebec. To start, Quebec has not been able to rely on the notwithstanding clause. Because the provincial language policy was predominantly challenged under section 23 pertaining to educational rights, the establishment of a rights violation by the judiciary could not be overturned constitutionally with the derogatory clause. In *Ford*, the only case in which the notwithstanding clause was available, its use was found to be politically non viable in the long-run. The unavailability of the notwithstanding clause has forced the Quebec government to show legislative ingenuity to pursue its linguistic goals, especially in the area of education.

As soon as the “Canada clause” was adopted in 1982, the Quebec government understood that the “Quebec clause” would not withstand a constitutional challenge. Even before it was struck down in *Quebec Protestant School Boards*, the government of René Lévesque made the application of the “Canada clause” conditional on the implementation of minority language education infrastructure in other provinces.¹⁵³ If the government was not able to safeguard the “Quebec clause,” it wished to help the vitality of French in other parts of the country. Eventually, the early jurisprudence of the Court invalidated this controversial CFL provision for which there was no cross-party consensus at the National Assembly. This legal defeat was somewhat easy to swallow for the Parti Québécois, as Quebec maintained the capacity to successfully integrate Allophones into French public culture.

The successive addition of the “major part requirement” to section 23(1)(b)¹⁵⁴ and section 23(2)¹⁵⁵ also helped Quebec in its quest to francize Allophones. Though it was initially adopted in view of

¹⁵³ CFL, *supra* note 30, as amended by SQ 1983 c 56, s 86.1.

¹⁵⁴ CFL, *supra* note 30, as amended by SQ 1983, c 56, s 73(a).

¹⁵⁵ CFL, *supra* note 30, as amended by SQ 1993, c 40, s 73(1).

widening the eligibility criteria to publicly-funded English school for Anglophones, it also had the effect of guaranteeing that those eligible to publicly-funded English schools would have a sufficient connection to the English minority, whether it be through their own education, that of their siblings or parents. Though this legal measure was read down in *Solski* with the imposition of the “significant part requirement,” Quebec's goal of preventing many members of the Francophone majority and the Allophone minority from artificially gaining access to publicly-funded English schools was maintained. Thanks to the earlier introduction of Bill 104, time spent in an unsubsidized English school would not be taken into account in determining eligibility to publicly-funded English schools. Bill 104 also provided that both the time spent at the elementary level and the secondary level would be taken into account when applying the “major part requirement.”

When the Supreme Court invalidated the new measures introduced by Bill 104 in *Nguyen*, it removed from Quebec government an important policy tool used to ensure integration of new comers into French public culture. The Ministère de l'Éducation, du Loisir et du Sport revealed that the number of children eligible to publicly-funded English education subsequent to an attendance in a non-subsidised English school went from 628 in 1998 to 1379 in 2002.¹⁵⁶ According to demographer Robert Maheu's conservative estimate, this number would have reached 11 000 in 2009, which amounts to 10% of the total population of public English schools in Québec.¹⁵⁷ These figures are more worrisome than those to which the Court referred to in *Nguyen*.¹⁵⁸ Though Bill 115 now outlaws “bridging-schools”, it

¹⁵⁶ Robert Maheu, “Table ronde 2009: Le jugement de la Cour suprême sur la loi 104 (partie II)” delivered at the Centre St-Pierre, 11 November 2009 [online: Institut de recherche sur le français en Amérique<http://irfa.ca/table2009_1.html>].

¹⁵⁷ *Ibid.*

¹⁵⁸ *Nguyen*, *supra* note 9 at para 42: “For example, in the 2001-2 school year, according to statistics provided by the Ministère de l'Éducation for the entire province of Quebec, just over 2,100 students enrolled in English-language UPSs at the pre-school, elementary and secondary levels throughout Quebec did not have certificates of eligibility for instruction in English (A.R., at p. 1605). Thus, before Bill 104 came into force, the time they spent in these institutions could have qualified them for a transfer to the publicly-funded English-language system. This represents just over 1.5 percent of the total number of students eligible for instruction in English that year

still allows members of the Francophone majority and of the Allophone minority to buy their children and their descendants, a right to publicly-funded English schooling. This constitutional loophole will undeniably increase language substitution to the benefit of English in Quebec, especially among members of the Allophone minority, who run the risk of cutting all significant contact with the French language.¹⁵⁹ For most Allophones living in the Montreal metropolitan area, where English continues to be a greater assimilating force than French,¹⁶⁰ integration into the majority public culture is inextricably linked to enrolment in French institutions¹⁶¹ or that of their children.¹⁶²

The analytical framework introduced in 2010 to determine eligibility to publicly-funded English school is likely to be legally challenged in the future.¹⁶³ The three-year minimum attendance to an unsubsidized English school in order to gain access to publicly-funded English school might be judicially reduced to a shorter period.¹⁶⁴ Considering this situation, what legislative remedies are still available to

(*Rapport sur l'évolution de la situation linguistique au Québec, 2002-2007*, at p. 82). This number has since increased. The number of students attending English-language UPSs who did not have certificates of eligibility exceeded 4,000 in the 2007-8 school year (A.R., at p. 1605)".

¹⁵⁹For a different view, see James B. Kelly, "Les limites de la mobilisation judiciaire: Alliance Québec, la Charte de la langue française et la Charte canadienne des droits et libertés" in François Rocher & Benoît Pelletier, eds, *Le nouvel ordre constitutionnel canadien du rapatriement de 1982 à nos jours* (Quebec City: Les Presses de l'Université du Québec, 2013) at 227-30. Kelly argues that the 2010 regulations have made eligibility to public English instruction, after a stay in the English private system, more restrictive because of the financial obstacle that represent the costs of attending private English school for three years and the discretionary nature of the eligibility granting process.

¹⁶⁰Groupe de travail ministériel pour un plan d'action en vue de promouvoir et de maintenir le caractère français de Montréal et d'assurer la vitalité et la qualité de la langue française au Québec, *Les défis de la langue française à Montréal et au Québec au XXI^e siècle: constats et enjeux* (Quebec City: Gouvernement of Quebec, 2000).

¹⁶¹See e.g. Marie McAndrew, "La loi 101 en milieu scolaire: Impacts et résultats" (2002) *Revue d'aménagement linguistique*, Fall special edition, 69; Isabelle Beaulieu, "Enfants de la loi 101" in Michel Venne, ed, *L'annuaire du Québec 2004* (Montreal: Fides, 2003) 1007.

¹⁶²See e.g. Alain Carpentier, *Tout est-il joué avant l'arrivée? étude de facteurs associés à un usage prédominant du français ou de l'anglais chez les immigrants allophones arrivés au Québec adultes* (Quebec City: Conseil supérieur de la langue française, 2004) at 42.

¹⁶³ See Dean Ardron, "Amendments to the Quebec Charter of the French Language Constitutionally Invalid" (2009) 19 *ELJ* 251; Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (Markham: Lexis Nexis, 2013) at 709-10.

¹⁶⁴ The minimum would likely not fall under one year. In *Nguyen*, Justice Lebel declared that "it might be thought that an educational pathway of six months or one year spent at the start of elementary school in an institution established to serve as a bridge to the public education system would not be consistent with the purposes of

Quebec to stop the expected turn towards an indirect freedom of choice in education? Two main solutions have been put forward to overcome this legal deadlock. First, some have argued that the application of the CFL should be extended to unsubsidized schools.¹⁶⁵ In practice, this would mean that only those who qualify for minority language education under section 23 of the *Charter* would have the right to attend unsubsidized English school in Quebec. Such a measure could easily be challenged in court on the basis that it violates the spirit of the minority language educational rights provision. The courts could argue that section 23 only applies in principle to publicly-funded schools. If the CFL is to be a legislative articulation of this constitutional provision, then it can't limit access to privately-funded schools.

The second proposed solution consists of amending the Canadian constitution through the bilateral amendment procedure found in section 43,¹⁶⁶ either to explicitly recognize that time spent in an unsubsidized English school in Quebec cannot open the door to public English school¹⁶⁷ or to enshrine an interpretative clause recognizing the specificity of Quebec,¹⁶⁸ similar to the ones proposed during the

s. 23(2) of the *Canadian Charter* and the interpretation given to that provision in *Solski*." See *Nguyen, supra* note 9 at para 44.

¹⁶⁵José Woerhling, "Les décisions de la Cour Suprême du Canada dans les affaires *Solski/Casimir et Gosselin*" (2005) 44 *Revue de Linguistique* 179; Robert Maheu, *supra* note 156; Daniel Proulx & Jean-Pierre Proulx, "Jugement sur la loi 104: Imposer la loi 101 aux écoles privées non subventionnées", *Le Devoir* (11 November 2009) A11; Conseil supérieur de la langue française, *Avis sur l'accès à l'école anglaise à la suite du jugement de la Cour suprême du 22 octobre 2009* (Quebec City: Conseil supérieur de la langue française, 2010) at 40-42.

¹⁶⁶*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* UK, 1982, c 11 [*Constitution Act 1982*], s 43 reads as follows:

An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
 (a) any alteration to boundaries between provinces, and
 (b) any amendment to any provision that relates to the use of the English or the French language within a province,
 may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

¹⁶⁷See Charles-Emmanuel Côté & Guy Tremblay, "Un remède durable", *La Presse* (24 November 2009) A21; Guy Tremblay, "La portée élargie de la procédure bilatérale de modification de la constitution" (2011) 41:2 *RGD* 417.

¹⁶⁸See David R Cameron & Jacqueline D Krikorian, *supra* note 82.

Meech and Charlottetown accords in order to protect the CFL from future attacks. It is unlikely however that the federal government would support such an amendment, considering the history of constitutional negotiations in Canada. In that sense, Quebec seems to have exhausted the legislative responses available to it to effectively counteract the Supreme Court's *Charter* jurisprudence.

By constantly being forced to comply with the Court's judgments, Quebec accepted to protect group-differentiated rights, and in some cases purely individual rights, to the detriment of its self-governing rights. Put simply, since the coming into force of the *Charter*, Quebec has not been able to stop the move towards an undifferentiated Canadian Citizenship.

Conclusion

By determining the content of linguistic rights, the courts rather than the governments have become central in the definition of Canadian citizenship. By constantly ruling against Quebec in matters of language policy, the Supreme Court denied the province its historical role in defining Canadian cultural citizenship. Quebec has contributed to making Canada federal in 1867 and later officially bilingual in 1969 by its political claims. However, the new constitutional order has made it more difficult for the province to further the multinational character of Canadian citizenship. Instead, the country appears to be headed towards a greater undifferentiated citizenship in which individual rights are favoured.

This phenomenon is not new. What is novel is the extent to which this individualisation of Canadian citizenship is occurring. Pierre Elliott Trudeau's vision of an undifferentiated citizenship clearly impacted Canada with the entrenchment of the *Charter* in 1982.¹⁶⁹ Early jurisprudence in the area of linguistic rights in Quebec constituted a first step in applying this new vision. In it, Anglophones' group-differentiated rights, which are exercised individually, were promoted to the detriment of Quebec's self-governing rights. Nonetheless, Quebec retained some policy tools to preserve its cultural distinctiveness by integrating immigrants into the French educational system. However, recent *Charter* jurisprudence challenged these tools by recognizing the purely individual right of Allophones and Francophones to indirectly access publicly-funded English Quebec schools in some circumstances, thereby increasing language substitution to the benefit of English. This has marked an even blunter step towards an undifferentiated citizenship.

However, Quebec has a justifiable claim to differential treatment from a constitutional, jurisprudential and normative perspective.¹⁷⁰ To begin, Canada's constitutional edifice contains asymmetrical arrangements that give Quebec a *de facto* special status. The *Quebec Act, 1774* restored the use of the civil code on the Province of Quebec's territory in private matters after the British Conquest,¹⁷¹ which makes modern Quebec the only Canadian province with a civilian legal tradition. By establishing the federal structure, the BNA Act ensured Quebec would be the only province with a Francophone majority. The BNA Act also provided that Quebec would be the only province in which the

¹⁶⁹ See Jenson, *supra* note 51; Russell, *supra* note 5; Daniel Weinstock, "The Moral Psychology of Federalism" in Fabien Gélinas & Jean-François Gaudreault-DesBiens, eds, *The States and Moods of Federalism: Governance, Identity and Methodology* (Cowansville, Québec: Éditions Y. Blais, 2005) 209.

¹⁷⁰ See for e.g. Benoît Pelletier, *Une certaine idée du Québec: Parcours d'un fédéraliste. De la réflexion à l'action* (Sainte-Foy: Presses de l'Université Laval, 2010) at 15-28; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th Ed (Cowansville: Éditions Yvon Blais, 2008) at 890-91.

¹⁷¹ *Quebec Act, 1774*, 14 Geo III c 83.

use of French and English in the legislature and the courts is constitutionally protected.¹⁷² Furthermore, Quebec is the only province to be exempted from the mother tongue clause in the section 23 of the *Charter*.¹⁷³

The recognition of a differential treatment for Quebec also has a jurisprudential basis when it comes to the particular case of minority language education. At the Quebec Court of Appeal level in the case of *Nguyen*, Justice Giroux gave compelling arguments as to why part of Bill 104 did not contravene section 23(2) of the *Charter* in his minority opinion.¹⁷⁴ Justice Giroux refused to literally apply section 23(2), thereby granting to a child the right to public minority language education after a short or significant stay in a private minority language school, and preferred to adopt a contextual interpretation of this rights provision. According to him, past judgements of the Supreme Court have established that the interpretation of section 23 should take into account the specific linguistic dynamic of each province¹⁷⁵ and allow for different solutions accordingly.¹⁷⁶ Furthermore, the Supreme Court has specifically mentioned that the linguistic concerns of the French majority in Quebec have a role to play in the interpretation of linguistic rights:

Rules to govern language rights [...] also inevitably have an impact on how Quebec's French-speaking community perceived its future in Canada, and even more so in North America as a whole. To this

¹⁷²*The Manitoba Act, 1870* later protected the use of French in English in the province's legislature and courts. See *Manitoba Act, 1870*, RSC 1970, App II, s 23. In 1982, sections 16 to 22 of the *Charter* gave French and English the status of official languages in the operations of the government of New Brunswick. See *Charter*, *supra* note 1, ss 16-22.

¹⁷³*Constitution Act 1982*, *supra* note 166, s 59.

¹⁷⁴*H.N. c Québec (Ministre de l'Éducation)*, 2007 QCCA 1111, [2007] RJQ 2097, at para 235-299.

¹⁷⁵"[D]ifferent interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province." *Public Schools Act*, *supra* note 147 at 851; "The application of section 23 is contextual. It must take into account the very real differences between situations of the minority language community in Quebec and the minority language communities of the territories and the provinces." *Solski*, *supra* note 8 at para 34.

¹⁷⁶"If the problems are different, the solutions will not necessarily be the same", *Gosselin*, *supra* note 7 at para 31.

picture must be added the serious difficulties resulting from the rate of assimilation of French-speaking groups outside Quebec, whose current language rights were acquired only recently, at considerable expense and with great difficulty. Thus in interpreting these rights, the courts have a responsibility to reconcile sometimes divergent interests and priorities, and to be sensitive to the future of each linguistic community.¹⁷⁷

Considering that Quebec was concerned with the integration of new comers and the growing phenomenon of “bridging schools”, Justice Giroux determined that section 23 of the *Charter* gave Quebec the necessary latitude to constitutionally restrict access to English schools.

From a normative perspective, the substantial equality of French and English will be better achieved through the recognition of a special status for Quebec, rather than with the application of constitutional parallelism in matters of minority language education. According to Carolyn J. Tuohy, the legal parallel treatment of English and French in the jurisprudence on educational rights originates from the two nations founding myth.¹⁷⁸ However, this constitutional parallelism does not reflect reality; the two “founding nations,” namely French Canadians and English Canadians, cannot be said to be on equal footing demographically speaking.¹⁷⁹ Furthermore, the precarious status of Francophone minorities outside Quebec does not compare to that of the established special status of the Anglophone minority

¹⁷⁷*Solski*, *supra* note 8 at para 5.

¹⁷⁸Tuohy, *supra* note 115.

¹⁷⁹56.9% of Canadians have English as a mother tongue, while only 21.7% of Canadians have French as a mother tongue. See Statistics Canada, *Population by mother tongue and age groups (total), percentage distribution (2011), for Canada, provinces and territories*, online: Statistics Canada <<http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hltfst/lang/Pages/highlight.cfm?TabID=1&Lang=E&Asc=0&PRCode=01&OrderBy=1&View=2&tableID=401&queryID=1&Age=1>>.

in Quebec. The latter can be qualified as a “dominant minority” due to its direct tie to the English majority in Canada.¹⁸⁰

Interestingly, all the rights demanded by Francophones outside Quebec had already been granted to Anglo-Quebeckers before the enactment of the *Charter*. Quebec guaranteed access to publicly-funded English instruction to its historical Anglophone minority,¹⁸¹ as well as management and control of its schools,¹⁸² irrespective of whether or not numbers warrant these rights in particular geographical areas. Furthermore, the right claims to which the justices responded favourably in Quebec to the dismay of the majority would have been non-issues outside Quebec where Anglophones do not feel the English language is threatened by language substitution to the benefit of French. Thus only by promoting French outside and inside Quebec will it have a chance to thrive in Canada.

In the end, the hopes of Quebec finding a solution to it not having a special status, should it decide to stay within the Canadian constitutional bosom, are grim. The reality of Canadian politics limits the capacity of stakeholders to amend the constitution.¹⁸³ Today, constitutional modification is mostly achieved through rights-based judicial review, and to a lesser extent, by the establishment of new

¹⁸⁰José Woehrling, “Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms” (1985) 31:1 McGill LJ 50.

¹⁸¹CFL, *supra* note 30 at para 73. Though the original CFL required protestant school boards to use French in their internal and external communications, this problem was remedied with the adoption of Bill 58. See *An Act respecting the eligibility of certain children for instruction in English*, *supra* note 140.

¹⁸²The Quebec Anglo-community has enjoyed control over its own education system since Confederation in 1867. See Garth Stevenson, *Community Besieged: The Anglophone Minority and the Politics of Quebec* (Montreal: McGill-Queen's University Press, 1999) at 26. Though the original CFL required protestant school boards to use French in their internal and external communications, this problem was remedied with the adoption of Bill 58. See *An Act respecting the eligibility of certain children for instruction in English*, *supra* note 140.

¹⁸³See especially Allan Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992); Christophe P Manfredi & Michael Lusztig, “Why Do Formal Amendments Fail? An Institutional Design Analysis” (1998) 50:3 World Politics 377; Peter H Russell, *supra* note 83.

conventions. Thus, as it stands, Quebec must accept that it has lost some relevance in the constitutional politics of language.